EMAS KIARA SDN BHD v. MICHAEL JOSEPH MONTEIRO & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL SUIT NO: 22NCVC-394-08-2014]
23 APRIL 2015

CIVIL PROCEDURE: *Striking out – Application for – Cause of action – Plaintiff filed fresh suit after earlier suit dismissed by High Court and by Court of Appeal upon appeal – Whether suit based on same pleaded facts – Proper course of action – Whether an attempt to circumvent appeal procedure – Whether an abuse of process of court – Rules of Court 2012, O. 18 r. 19(1)*

CIVIL PROCEDURE: *Res judicata – Decision, finality of earlier decision – Interlocutory proceedings – Whether decision must be final for res judicata to be applied*

COMPANY LAW: *Receiver and manager – Scope of authority – Receivers and managers appointed to realise assets of company towards settlement of sums due to debenture holder – Whether receivers and managers agents of debenture holder – Whether acts of receivers and managers binds debenture holder*

The third defendant ('the company') defaulted under the terms of the banking facilities granted by the 12th defendant, RHB Bank Bhd ('RHB'). The first and second defendants ('the receivers and managers') were therefore appointed to realise the assets charged, which included the subject properties, under the debentures, which secured the banking facilities, towards the settlement of the sums due and owing by the company to RHB. The receivers and managers subsequently published an advertisement. Several expressions of interest to purchase the subject properties were received, including one from the plaintiff and another from the fourth to 11th defendants ('Farcoll and others'). The receivers and managers also received an expression of interest from another party. The plaintiff subsequently claimed that there was an enforceable agreement for the plaintiff to purchase the subject properties from the receivers and managers and thus commenced a suit against the receivers and managers ('the first suit'). The receivers and managers denied that there was a concluded contract. A dispute had also arisen between the receivers and managers and the company on one hand, and Farcoll and others on the other. Farcoll and others commenced an action in the High Court ('Farcoll suit'). However, the parties to the Farcoll suit entered into a settlement agreement and eight sale and purchase agreements ('SPAs') which provided, *inter alia*, for the purchase by Farcoll and others of the subject properties. In light of the first suit, the settlement agreement provided for the re-transfer of the subject properties in the event the plaintiff succeeded in its

claim against the receivers, managers, the company and in the event the plaintiff obtained an order for specific performance. Thereafter, Farcoll and others applied to intervene in the first suit but was opposed by the plaintiff. Subsequently the plaintiff and the defendants recorded a consent order in the first suit, the terms of which provided, *inter alia*, that the transfer of the subject properties to Farcoll and others may proceed and that if the plaintiff succeeded in obtaining an order for specific performance, the titles to the properties would be transferred either back to the company or directly to the plaintiff. Before the trial of the first suit, the plaintiff sought to join Farcoll and others and RHB as the co-defendants in the first suit and to re-amend its statement of claim to include conspiracy as an additional cause of action. However, the applications were dismissed both by the High Court and upon subsequent appeal to the Court of Appeal. The plaintiff subsequently commenced the present suit, substantially reproducing the proposed re-amended statement of claim in the first suit. Hence, the defendants sought to strike out the plaintiff's claim. The issues that arose for the court's determination *inter alia* were: (i) whether the receivers and managers were agents of RHB, as the appointing debenture holder, and whether RHB could be made liable for the act of the receivers and managers; (ii) whether RHB qua debenture holder owed a duty of care to the plaintiff; (iii) whether the plaintiff's claim disclosed a reasonable cause of action *vis-a-vis* Farcoll and others; (iv) whether the plaintiff's claim for conspiracy could be sustained; (v) whether the plaintiff's claim was barred by *res judicata* due to the decision of the High Court in the first suit; and (vi) whether the plaintiff's action was an attempt to circumvent the need to apply for leave of the Federal Court to appeal against the decision of the Court of Appeal in the first suit.

Held (dismissing plaintiff's action with costs):

(1) An agent, as a fiduciary, owes contractual and equitable duties to its principal. In addition, an agent is also frequently authorised to undertake certain acts on behalf of its principal, which acts then operate to bind the principal. Indeed, the agent may bind the principal even where he oversteps the bounds of his actual authority, based on the doctrine of ostensible authority. Clause 12.4 of the debenture delimits the ability of the receivers and managers to bind RHB. The scope of the receivers and managers' authority operated to bind the company and not RHB as the debenture holder, as the acts of the receivers and managers are carried out on behalf of the company and not the debenture holder. (paras 29 & 30)

(2) The plaintiff's allegation of conspiracy against RHB arose through the acts of the receivers and managers. However, RHB could not be made liable for the acts of the receivers and managers. Hence, the plaintiff's allegation of conspiracy against RHB could not be sustained. Further, the plaintiff's case was that the duty of care arose through the acts of the

receivers and managers. Even if such a duty of care was owed by the receivers and managers, no liability would attach to RHB on account of any breach of this duty by the receivers and managers. (paras 33 & 36)

(3) An action in negligence is not predicated on the existence of privity between the parties. The nature of the relationship between a debenture holder and a prospective purchaser would not give rise to a duty of care on the part of the debenture holder. The debenture holder is concerned only with the realisation of its security in order that the debt owed to it may be paid off. Hence, RHB, qua debenture holder did not owe a duty of care to the plaintiff as a purchaser of the secured properties. (para 41)

(4) In considering the application by Farcoll and others under O. 18 r. 19(1)(a) of the Rules of Court 2012 to strike out the plaintiff's amended statement of claim, the court may only consider the pleadings and not any affidavit evidence. The application herein must fail as the amended statement of claim disclosed a reasonable cause of action. (paras 44 & 45)

(5) The settlement agreement and the SPAs did not and could not have the effect of defeating the plaintiff's claimed interest in the subject properties as the terms of the settlement agreement contained provisions that sought to preserve the plaintiff's rights in the subject properties should it succeed in the first suit. Accordingly, the portions of the amended statement of claim that related to the allegation of conspiracy surrounding the settlement agreement ought to be struck out. (paras 51, 53 & 76)

(6) For *res judicata* to apply, a decision must be final. A court may, even in interlocutory proceedings, come to definite or conclusive finding of fact or law and whether or not an interlocutory decision was definitive is a matter of the proper construction of the judgment in question. Based on a proper construction of the grounds of judgment in the interlocutory application in the first suit, there was no definitive finding on the question of conspiracy relating to the period prior to the commencement of the first suit. Accordingly, *res judicata* did not apply to bar the plaintiff from maintaining the cause of action of conspiracy against the first to 11th defendants in respect of such period. (paras 57 & 67)

(7) In the present case, the plaintiff's application had proceeded to be heard before the High Court, and was dismissed. The plaintiff appealed to the Court of Appeal, which dismissed the appeal. The proper course of action would have been to seek leave of the Federal Court to appeal against the decision of the Court of Appeal. Hence, the commencement

A of this suit based on the same pleaded facts amounts to an attempt to circumvent the necessary appeal procedure and was thus an abuse of process of court. (paras 71 & 78)

Case(s) referred to:

Cuckmere Brick Company v. Mutual Finance Ltd [1971] Ch 949 ***(refd)***

B *Dato' Seri Dr Kok Mew Soon & Ors v. Mustapha Mohamed [2008] MLJU 919* ***(refd)***

ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd & Ors & Other Cases [2014] 1 LNS 1493 HC ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Medforth v. Blake [2000] Ch 868 ***(refd)***

Pembinaan & Pemaju Mahajiwa (Selangor) Sdn Bhd v. ASM Development Sdn Bhd

C *[2003] 4 CLJ 213 FC* ***(dist)***

Re B Johnson & Co Ltd [1955] Ch 634 ***(refd)***

Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(dist)***

Legislation referred to:

Pengurusan Danaharta Nasional Berhad Act 1998, s. 72

D Rules of Court 2012, O. 18 r. 19(1), (b), (c), (d)

For the plaintiff - Tommy Thomas (Rabinder Singh with him); M/s Rabinder Budiman & Assocs

For the 1st to 3rd defendants - Benjamin John Dawson (Koh San Tee with him); M/s Benjamin Dawson

E *For the 4th to 11th defendants - Gideon Tan (Alfred Lai with him); M/s Gideon Tan Razali Zaini*

For the 12th defendant - Lambert Rasa-Ratnam (CS Mong & Cindy Sim with him); M/s Lee Hishammuddin Allen & Gledhill

Reported by S Barathi

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JUDGMENT

Azizul Azmi Adnan JC:

Introduction

G **[1]** This is a written judgment delivered in an application by the defendants to strike out the claim of the plaintiff.

[2] In order to contextualise the nature of the claim, it will be necessary to recite the brief facts of this case. The background facts, in so far as they are material to this application are set out below, which I have adapted from

H the submissions of counsel to whom I am grateful.

Background

[3] The plaintiff claims that there exists a concluded contract for the purchase of land and properties in Lembah Beringin entered into between the

I plaintiff on the one hand as purchaser, and the first, second and third defendants on the other. The first and second defendants are receivers and

managers of the third defendant, Lembah Beringin Sdn Bhd (referred to in this judgment as the company), who were appointed by the 12th defendant, RHB Bank Berhad (RHB) as a debenture holder under and pursuant to the terms of debentures created by the company in favour of RHB. These debentures, which secured banking facilities granted by RHB to the company, created fixed and floating charges over the present and future undertakings and assets of the company, which include the subject properties in Lembah Beringin. The company defaulted under the terms of the banking facilities and the receivers and managers were appointed on 11 November 2005 to realise the assets charged under the debentures towards settlement of the sums due and owing by the company to RHB.

[4] The receivers and managers published an advertisement in a newspaper on 5 May 2011 to seek expressions of interest from the public to purchase the subject properties. An information memorandum dated on this day was also issued by the receivers and managers to interested bidders.

[5] Several expressions of interest for the properties were received at the close of the period specified for submission of expressions of interest. These include an expression of interest from the plaintiff for RM60.8 million, and an expression of interest from the fourth to the 11th defendants for RM50 million. For ease of reference, the fourth to the 11th defendants are referred to here as Farcoll and others.

[6] After considering the expressions of interest, the receivers and managers held a closed tender and invited the persons who had submitted expressions of interest to improve their expressions of interest. In response to the invitation from the receivers and managers, the plaintiff increased its expression of interest to RM83.8 million and Farcoll and others increased their expression of interest to RM84 million. It should be noted that I use the term "expression of interest" advisedly, as this term is frequently used in contradistinction to the term "offer", which in law is capable of acceptance to form a binding contract. I express no opinion on the proper legal characterisation of these expressions of interest in the present case, as the application before me is simply an interlocutory matter and it is thus unnecessary for me to make a ruling on their true legal nature.

[7] On 12 September 2011, the receivers and managers also received an expression of interest of RM84 million from Pillar Quest Sdn Bhd (Pillar Quest). Both Pillar Quest and the company were wholly owned subsidiaries of Land & General Berhad.

[8] The receivers and managers then sought to include additional terms and conditions on the sale of the properties, which were communicated to the three groups of interested bidders. I pause here to observe that the

imposition of additional terms in these circumstances is not unusual in a negotiated auction sale, as it provides the seller with a means to make a like for like comparison between the various bids received.

[9] What happened next forms the crux of the claim of the plaintiff and the dispute before me. The plaintiff claimed that there was an enforceable agreement for the plaintiff to purchase the subject properties from the receivers and managers, acting for and behalf of the company. The receivers and managers on the other hand denied that there was a concluded contract.

[10] The plaintiff then commenced a suit on 13 June 2012 in the High Court at Kuala Lumpur, Suit No. 22NCVC-722-06-2012 against the receivers and managers and the company. This action is referred to here as the first suit.

[11] A dispute had also arisen between the receivers and managers and the company, on the one hand, and Farcoll and others, on the other. Farcoll and others commenced an action on 4 November 2011 in the High Court at Shah Alam, referred to here as the Farcoll suit.

[12] On or around November 2011, Land & General Berhad and Pillar Quest also commenced legal action against the receivers and managers, which suit was subsequently settled on 30 October 2012.

[13] The parties to the Farcoll suit reached a settlement, as a consequence of which the receivers and managers, the company and Farcoll and others entered into a settlement agreement (the settlement agreement) and eight sale and purchase agreements (SPAs), all of which were dated 20 July 2012. The SPAs provided for the purchase by Farcoll and others of the subject properties. It will be recalled that at the time these agreements were signed, the plaintiff had already commenced the first suit. As such, the settlement agreement provided *inter alia* for the retransfer of the subject properties in the event that the plaintiff succeeded in its claim against the receivers and managers and the company and in the event the plaintiff obtained an order for specific performance.

[14] Thereafter, Farcoll and others applied to intervene in the first suit, which was opposed by the plaintiff.

[15] On 16 May 2013, the plaintiff and the defendants recorded a consent order in the first suit, the terms of which provided *inter alia* that the transfer of the subject properties to Farcoll and others may proceed and that if the plaintiff succeeded in obtaining an order for specific performance, the titles to the properties will be transferred either back to the company or directly to the plaintiff.

[16] Three weeks prior to the dates fixed for the trial of the first suit, the plaintiff applied to join Farcoll and others and RHB as co-defendants in the first suit and to re-amend its statement of claim to include conspiracy as an additional cause of action. As a result, the trial dates were vacated.

[17] The applications by the plaintiff in the first suit for the re-amendment of the statement of claim and to join the fourth to 12th defendants were dismissed by the High Court on 14 February 2014. Written grounds for this decision were provided on 17 March 2014. The plaintiff appealed against this decision, which appeal was dismissed by the Court of Appeal on 20 August 2014.

[18] On 26 August 2014, the plaintiff then commenced this suit, in which the plaintiff's statement of claim substantially reproduces the proposed re-amended statement of claim in the first suit, the application for which had been refused by the High Court in the first suit.

Issues

[19] The grounds on which the defendants seek to strike out the plaintiff's claim are as follows:

(a) RHB made its application pursuant to O. 18 r. 19(1)(b) and (d) of the Rules of Court 2012[1]. Mr Lambert Rasa-Ratnam, counsel for RHB, argued that the plaintiff's claim ought to be struck out as it is scandalous, frivolous and vexatious and an abuse of the process of court for the following reasons:

(i) the receivers and managers are not in law the agents of RHB, the debenture holder, and so RHB cannot be made liable for acts of the receivers and managers;

(ii) not only was RHB not a party to the sale of the subject properties, but it also owed no duty of care to the plaintiff or any other prospective purchaser to ensure that active steps were taken towards formalisation and finalisation of a sale and purchase agreement with the plaintiff;

(iii) the allegation of conspiracy was unfounded, as the effect of the 16 May 2013 consent order was not to defeat the plaintiff's purported rights to the subject properties, but in fact preserved its rights should the plaintiff succeed in obtaining an order of specific performance in the first suit; and

(iv) the plaintiff's claim was barred by *res judicata* by reason of 14 February 2014 decision of the High Court in the first suit;

(b) the receivers and managers and the company made its application pursuant to O. 18 r. 19(1)(b), (c) and (d)[2]. Mr Benjamin Dawson for the first to third defendants, proffered two main grounds:

(i) firstly that the claim was barred by *res judicata* for the same reason argued by Mr Rasa-Ratnam in sub-para. (a)(iv), *ante*; and

(ii) secondly, the claim was unsustainable and an abuse of the process of the court, because the terms of the settlement agreement operated to preserve the plaintiff's rights in the event that it succeeds in the first suit. Accordingly, as the settlement agreement was not damaging to the interests of the plaintiff, there cannot be said to exist any conspiracy between the defendants;

(c) Farcoll and others made its application pursuant to O. 18 r. 19(1)(a), (b), (c) and/or (d)[3]. Mr Gideon Tan, counsel for Farcoll and others, argued that:

(i) the pleadings do not disclose a reasonable cause of action, and so ought to be dismissed pursuant to O. 18 r. 19(1)(a);

(ii) the present suit is in direct opposition with the spirit of 16 May 2013 consent order in the first suit, and hence ought to be struck out pursuant to O. 18 r. 19(1)(c); and

(iii) the action by the plaintiff is an abuse of process of court and so should be struck out pursuant to O. 18 r. 19(1)(d), on the basis that it is an attempt to circumvent the need to apply for leave of the Federal Court to appeal against the decision of the Court of Appeal in the first suit.

[20] It is clear that there is substantial overlap in the grounds cited by counsel for the defendants. To my mind, the issues may be grouped in the following manner:

(a) whether the receivers and managers are agents of RHB, as the appointing debenture holder, and whether RHB can be made liable for the acts of the receivers and managers. I note that these are connected but distinct issues, as will be explained post;

(b) whether RHB *qua* debenture holder owes a duty of care to a prospective purchaser of the subject properties such as the plaintiff;

(c) whether the plaintiff's claim discloses a reasonable cause of action *vis-à-vis* Farcoll and others;

(d) whether the plaintiff's claim for conspiracy may be sustained in the light of the contention by the defendants that:

(i) the settlement agreement in fact operated to preserve the plaintiff's rights; and

(ii) the plaintiff was bound by the terms of 16 May 2013 consent order, which had also operated to preserve the plaintiff's rights;

(e) whether the plaintiff's claim is barred by *res judicata* due to 14 February 2014 decision of the High Court in the first suit; and

(f) whether the action by the plaintiff is an abuse of process of court and so should be struck out on the basis that it is an attempt to circumvent the need to apply for leave of the Federal Court to appeal against the decision of the Court of Appeal in the first suit.

[21] These issues are addressed in turn.

Receivers And Managers As Agent Of Debenture Holder

[22] Mr Lambert Rasa-Ratnam argued that the receivers and managers are not agents of RHB and therefore RHB cannot be made liable for the acts of the receivers and managers.

[23] The terms of the debenture dated 25 October 1999 make this clear. Clause 12.4 expressly provides that the receiver (defined in the debenture to include a receiver and manager) acts as an agent of the company as borrower, and that RHB will not be responsible for any misconduct, negligence or default of the receiver and manager.

[24] Of course, the debenture operates in contract, a contract to which the plaintiff is not party. The position in equity is that a receiver owes fiduciary duties not only to the chargee to realise the value of the secured property but also to the chargor, due to the chargor's interest arising through its equity of redemption. The existence of this duty is of course subject to any contractual provision that modifies the scope of the fiduciary duty. I observe that there is no provision in the debenture or in any other document before me in evidence that negatives the existence of this duty.

[25] The receivers and managers are then fiduciaries of both the company as borrower and chargor, and RHB as chargee and debenture holder. If the receivers and managers are fiduciaries of RHB, does it therefore not follow that they are also as a consequence agents of RHB?

[26] Mr Tommy Thomas for the plaintiff directed the attention of this court to the decision of the Federal Court in *Dato' Seri Dr Kok Mew Soon & Ors v. Mustapha Mohamed*[4], where it was held that, in the context of s. 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 (the Danaharta Act) at least, a receiver and manager is an agent of not only the borrower but also of the lending bank at the same time. Zaki Tun Azmi PCA (as His Lordship then was), in holding that a receiver and manager was agent of the lending bank, referred to English authorities that explained the nature of the duties of a receiver, which is primarily for the benefit of the mortgagee bank to realise its security.

[27] Mr Thomas, who had successfully argued the point before the Federal Court in *Kok Mew Soon*, submitted before me that, on the basis of that decision, the receivers and managers in the present instance must also be agents of RHB.

[28] While I accept his arguments, I am of the view that the use of the term "agent" obfuscates rather than reveals the real issue.

[29] An agent, as a fiduciary, owes contractual and equitable duties to its principal. In addition, an agent is also frequently authorised to undertake certain acts on behalf of its principal, which acts then operate to bind the principal. Indeed, the agent may bind the principal even where he oversteps the bounds of his actual authority, based on the doctrine of ostensible authority.

[30] In the present instance, the receivers and managers owe fiduciary duties to RHB, and in this sense they may be said to be agents of RHB. However, cl. 12.4 of the debenture delimits the ability of the receivers and managers to bind RHB. The scope of the receivers and managers' authority operated to bind the company, and not RHB as debenture holder, as the acts of the receivers and managers are carried out on behalf of the company[5] and not the debenture holder. The nature of the obligations of a receiver and manager is succinctly explained in the following passage of the decision of the English Court of Appeal in *Re B Johnson & Co, Ltd*[6]:

> It has long been recognised and established that receivers and managers so appointed are, by the effect of the statute law, or of the terms of the debenture, or both, treated, while in possession of the company's assets and exercising the various powers conferred upon them, as agents of the company, in order that they may be able to deal effectively with third parties. But, in such a case as the present at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realise the security; that is the whole purpose of his appointment; and the powers which are conferred upon him, and which I have to some extent recited, are ... really ancillary to the main purpose of the appointment, which is the realisation by the mortgagee of the security (in this case, as commonly) by the sale of the assets.

[31] There is no evidence before me that suggests that there had been any representation from RHB to the plaintiff such that there could be said to have arisen ostensible authority on the part of the receivers and managers to bind RHB. On the contrary, the contemporaneous documentary evidence show measured and guarded responses from RHB that can in no way be interpreted to suggest that RHB[7] as debenture holder was directing the actions and decisions of the receivers and managers.

[32] The position of a receiver and manager may be summed up as follows: the receiver and manager primarily owes a fiduciary duty to the debenture holder to realise the value of the security secured by the debenture. The receiver and manager will also owe a fiduciary duty to the chargor arising as a result of the chargor's beneficial interest in the secured property, often referred to as its equity of redemption. The receiver and manager is, in this

context, an agent of both the chargor and the chargee, on the authority of *Kok Mew Soon*. The receiver and manager is nonetheless primarily an agent of the chargor, as any acts he carries out is done on behalf of the chargor. In the absence of any agreement, any express or implied authorisation, or any representation that invokes the application of the doctrine of ostensible authority, a receiver and manager cannot carry out any act that will operate to bind the chargee, as the actions of the receiver and manager are carried out on behalf of the chargor as security provider.

[33] The plaintiff's allegation of conspiracy against RHB as the 12th defendant arose through the acts of the receivers and managers. As RHB cannot be made liable for the acts of the receivers and managers, I am of the view that the plaintiff's allegation of conspiracy against RHB cannot be sustained.

Duty Of Care Of RHB To The Plaintiff

[34] The plaintiff claimed in para. 35(i) of its amended statement of claim as follows:

> Selaras dengan Kontrak tersebut, Defendan Pertama, Defendan Kedua dan Defendan Kedua belas mempunyai satu kewajipan penjagaan terhadap Plaintif untuk mengambil langkah aktif dan meneruskan ke arah perasmian dan penyempurnaan Kontrak tersebut termasuk tetapi tidak terhad kepada pelaksanaan Perjanjian Jual Beli dan akhirnya memindahkan pemilikan undang-undang Jualan Hartanah-Hartanah ("Sale Properties") kepada Plaintif dan menyerahkan pemilikan kosong.[8]

[35] "Kontrak tersebut", referred to in the passage quoted above, refers to the contract that the plaintiff claimed exists between the company and the plaintiff by virtue of the letter of acceptance from the receivers and managers dated 17 October 2011.

[36] From para. 35(i) of the amended statement of claim, it would appear that the plaintiff's case is that the duty of care arose through the acts of the receivers and managers, being the first and second defendants. As I have ruled in paras. 32 and 33 *ante* that RHB cannot be made liable for the acts of the receivers and managers, it would follow that, even if such a duty of care was owed by the receivers and managers, no liability will attach to RHB on account of any breach of this duty by the receivers and managers.

[37] The next issue is whether RHB as debenture holder could be said to owe a duty of care directly to a prospective purchaser of the secured properties.

[38] The argument was advanced on behalf of RHB that because it was not a party to the purported sale of the properties by the company to the plaintiff, RHB did not owe the plaintiff any duty of care. A number of cases were cited by counsel in support of this proposition. This assertion overlooks the

fundamental point that an action in negligence is not predicated on the existence of privity between the parties. The cases by learned counsel in submissions are of no assistance to his case. For example, *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah*[9] was a case where the plaintiff sought either shares or the return of loaned sums, and would appear to have been based on contract, although the learned judge observed that "riotous uncertainty" afflicted the pleadings in that case.

[39] Be that as it may, no authority was cited in support by the counsel for the plaintiff in support of the proposition that a debenture holder owed a duty of care to a prospective purchaser of the properties that are secured by the debenture in question. In my judgment, the nature of the relationship (if any relationship existed at all) between a debenture holder and a prospective purchaser would not give rise to a duty of care on the part of the debenture holder. The debenture holder is concerned only with the realisation of its security in order that the debt owed to it may be paid off. A mortgagee exercising a power of sale owes the mortgagor an equitable duty to take reasonable steps to obtain a proper price: *Cuckmere Brick Company v. Mutual Finance Ltd*[10]. Whether a tortious duty is also owed to the mortgagor is immaterial and does not affect the legal analysis. In the context of the duty owed by a receiver to the mortgagor, Sir Richard Scott VC had this to say in the English Court of Appeal decision of *Medforth v. Blake*[11]:

> I do not accept that there is any difference between the answer that would be given by the common law to the question what duties are owed by a receiver managing a mortgaged property to those interested in the equity of redemption and the answer that would be given by equity to that question. I do not, for my part, think it matters one jot whether the duty is expressed as a common law duty or as a duty in equity. The result is the same. The origin of the receiver's duty, like the mortgagee's duty, lies, however, in equity and we might as well continue to refer to it as a duty in equity.

[40] In my view, the same reasoning applies in the context of the duty of a mortgagee to the mortgagor. However, that is the full extent of the duty owed by a mortgagee or debenture holder.

[41] In summary, I find that:

(a) even if the receivers and managers owed a duty of care to the plaintiff to take active steps and proceed towards formalisation and completion of the purported contract, no liability will attach to RHB on account of any breach of this duty by the receivers and managers; and

(b) RHB *qua* debenture holder does not owe a duty of care to the plaintiff as a purchaser of the secured properties.

[42] For the avoidance of doubt, I express no view on the existence or otherwise of the contract between the plaintiff and the company; that is an issue to be determined at trial.

Whether The Statement Of Claim Discloses A Reasonable Cause Of Action

[43] Mr Gideon Tan submitted on behalf of Farcoll and others that the plaintiff's amended statement of claim does not disclose a reasonable cause of action, and so should be struck out pursuant to O. 18 r. 19(1)(a) of the Rules of Court 2012.

[44] In considering an application under r. 19(1)(a), the court may only consider the pleadings and not any affidavit evidence.

[45] On this basis, the application by Farcoll and others under r. 19(1)(a) must fail, as I am of the view that the amended statement of claim does disclose a reasonable cause of action.

[46] I now consider whether the claim for conspiracy can be sustained in the light of the provisions of the settlement agreement and 16 May 2013 consent order.

The Claim For Conspiracy

[47] It will be recalled that the plaintiff applied to amend its statement of claim just three weeks before the case was set down for trial in the first suit. Among the proposed amendments was the inclusion of conspiracy as an additional cause of action.

[48] The particulars of conspiracy are broken into four different categories, each relating to a specific period. The conspiracy was alleged to have occurred:

(a) during the bidding and tender process;

(b) after the filing of first suit;

(c) in relation to events surrounding the settlement of the Pillar Quest suit; and

(d) in relation to events surrounding the settlement agreement.

[49] The defendants argue that the claim of conspiracy by the plaintiff is unsustainable for the reason that the terms of the settlement agreement contained provisions that sought to preserve the plaintiff's rights in the subject properties should it succeed in the first suit. Specifically:

(a) under the terms of the settlement agreement, the parties specifically acknowledged the existence of the plaintiff's claim and the first suit; and

(b) Farcoll and others undertook in cl. 6.1(3) of the settlement agreement to transfer the subject properties back to the company or directly to the plaintiff in the event that the plaintiff successfully obtains an order for specific performance in the first suit.

[50] Given these provisions, the defendants contend that there cannot be said to be any agreement to injure or cause damage to the plaintiff, an essential ingredient in the tort of conspiracy.

[51] Of course, the plaintiff is not a party to the settlement agreement, and is therefore not bound by its terms, although this does not prevent this court from finding that, based on a proper construction of the settlement agreement, the claim of conspiracy cannot be maintained.

[52] The defendants further contend that the terms of 16 May 2013 consent order (to which the plaintiff is a party) mirror the terms of cl. 6.1(3) of the settlement agreement, which provided for the retransfer of the subject properties. The terms of the consent order specifically provided that the order shall not prevent the transfer of the subject properties to Farcoll and others. In my view, this order effectively means that the plaintiff has agreed to allow Satha & Co, as trustee, to affect the transfer of the properties to Farcoll and others, subject to the retransfer obligation.

[53] I therefore agree with the submissions of Mr Dawson for the first to third defendants that the settlement agreement and the SPAs did not and could not have the effect of defeating the plaintiff's claimed interest in the subject properties. Accordingly, the portions of the amended statement of claim that relate to the allegation of conspiracy surrounding the settlement agreement ought to be struck out.

[54] This leaves the particulars of conspiracy that relate to the periods prior to the settlement agreement, which remain unaffected by the arguments of counsel for the defendants on this point.

Res Judicata

[55] The defendants argue that the plaintiff's claim for conspiracy is barred by *res judicata*.

[56] It was advanced on behalf of the defendants that, based on a proper construction of 17 March 2014 grounds of judgment of the High Court in the first suit dismissing the plaintiff's application for joinder and re-amendment of the statement of claim, there was a final determination by the learned judge on the lack of *bona fides* of the plaintiff in including the allegation of conspiracy. The defendants argue that the issue was *res judicata*, and may not be raised afresh in this suit.

[57] It is trite law that for *res judicata* to apply, a decision must be final. Nevertheless, even an interlocutory ruling or decision remains binding until reversed on appeal (see *Hartecon JV Sdn Bhd Anor v. Hartela Constractorts Ltd*[12]). A court may, even in interlocutory proceedings, come to a definitive or conclusive finding of fact or law. Whether or not an interlocutory decision

was definitive is a matter of the proper construction of the judgment in question: *ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd & Ors & Other Case*[13].

[58] In the grounds of judgment of 17 March 2014, the learned judge in the first suit held that the application for joinder of the fourth to 12th defendants could not succeed because of the consent order. At a case management conference before the learned judge, the plaintiff had previously declined for the interveners (the fourth to the 11th defendants in this suit, being Farcoll and others) to be made co-defendants, and so could not subsequently apply for them to be made co-defendants, as to do so would nullify the basis upon which the parties agreed to the making of the consent order.

[59] In para. 44 of 17 March 2014 grounds of judgment, the learned judge was of the view that the allegation of conspiracy was not in existence at the date of the issue of the writ in the first suit, and hence the plaintiff would have had to file a fresh suit in order to prove the allegation of conspiracy.

[60] It will be recalled that the first suit was commenced on 12 June 2012. The settlement agreement and the SPAs were entered into on 20 July 2012. I have held in paras. 52 and 53 *ante* that the plaintiff's amended statement of claim, in as far as it related to the allegation of conspiracy surrounding the settlement agreement ought to be struck out.

[61] However, the plaintiff's allegation of conspiracy also pertains to the period prior the commencement of the first suit, in relation to events surrounding the bidding and tender process (see para. 48 *ante*).

[62] At para. 45 *et seq* of 17 March 2014 grounds of judgment, the learned judge proceeded to consider whether there were cogent reasons for the exercise the discretion of the court in favour of the plaintiff to allow the re-amendment of the statement of claim. Accordingly, it is clear to my mind that the plaintiff's application was not dismissed for the sole reason that the events complained of arose after commencement of the first suit.

[63] The learned judge found that on 17 November 2011, the plaintiff was informed about the Farcoll suit and that all the information that had been included in the proposed re-amended statement of claim could have been obtained from the pleadings in the Farcoll suit. At this time, the settlement agreement and the SPAs had not yet been entered into. The plaintiff ought to have known about these agreements by 15 October 2012, as these agreements were appended to the affidavit supporting the intervention application of that date.

[64] As such, the material facts ought to have been available to the plaintiff even before the commencement of the first suit. The plaintiff however applied only on 14 October 2013 to amend its statement of claim after receiving the interveners' bundle on 17 July 2013.

[65] At para. 59 of the grounds of judgment, the learned judge held:

> It is trite that an allegation of fraud, conspiracy too for that matter which is no less serious in nature, must be made at the earliest possible opportunity (see *Jupiter Securities Sdn Bhd v. Wan Yaakub bin Ab Rahman* [2002] 3 MLJ 264). The plaintiff did not do so. It is my finding that the delay in this application is inexcusable and inordinate. This application obviously lacks *bona fide*.

[66] Having considered the grounds of judgment in detail and as a whole, I am of the view that the learned judge had ruled the application was not made *bona fide*:

(a) because of the plaintiff's inordinate delay in filing the application only in October 2013, when the material facts were available to it even before the commencement of the first suit; and

(b) because the plaintiff's allegation of conspiracy relating to the events surrounding the entry of the settlement agreement and the SPAs was negated by the existence of the consent order.

[67] In my judgment, based on a proper construction of the grounds of judgment in the interlocutory application in the first suit, there was no definitive finding on the question of conspiracy relating to the period prior to the commencement of the first suit. Accordingly, *res judicata* does not apply to bar the plaintiff from maintaining the cause of action of conspiracy against the first to 11th defendants in respect of such period.

Leave Of The Federal Court

[68] The final issue for my consideration is whether the plaintiff was right to have commenced a fresh action based on a statement of claim that is in all material respects identical to the proposed re-amended statement of claim. The High Court had dismissed the plaintiff's application for amendment in the first suit. The plaintiff appealed, and the Court of Appeal dismissed its appeal. Mr Tan for Farcoll and others argued that this amounted to an abuse of the process of court, as it was an attempt to circumvent the need to apply for leave of the Federal Court to appeal against the decision of the Court of Appeal in the first suit.

[69] Mr Thomas replied on the authority of *Pembinaan & Pemaju Mahajiwa (Selangor) Sdn Bhd v. ASM Development Sdn Bhd*[14] that the plaintiff had the option to appeal or to file afresh, and the fact that it chose one and not the other is not abuse of the process of the court.

[70] With respect to counsel, the case of *Pembinaan Pemaju Mahajiwa* dealt with the issue of whether there was a failure to comply with a peremptory order of court that amounted to contumelious conduct, which then entitled the court to strike out on the basis of abuse of process any further suits

initiated on the same facts. In that case, the Federal Court held that a plaintiff whose suit was struck out for want of authority was free to either appeal against the decision of the Senior Assistant Registrar or to file afresh.

[71] In the present case, the plaintiff's application had proceeded to be heard before the High Court, and was dismissed. The plaintiff appealed to the Court of Appeal, which dismissed the appeal. The proper course of action would have been to seek leave of the Federal Court to appeal against the decision of the Court of Appeal.

[72] Had the plaintiff's action in the first suit been struck out for failing to comply with the requirements of procedure, or for failing to comply with a peremptory court order, then the plaintiff would have been free to file a fresh action if the plaintiff's conduct was not contumacious. Similarly, if the plaintiff had simply discontinued the first suit before the High Court, it would have been at liberty to commence this action. However, that is not the case in the present instance, where the plaintiff's application had been heard, and full opportunity had been given for senior counsel to argue both before this court and that above. I accordingly hold that the commencement of this suit based on the same pleaded facts amounts to an attempt to circumvent the necessary appeal procedure and is thus an abuse of process of court.

[73] It is true that the some of the facts relied upon in the present action relates to a period after the commencement of the first suit, and in the ordinary course of events, it would have been necessary for the plaintiff to have commenced a new suit to pursue its claim. However, like the learned judge before me, I am of the view that the plaintiff's allegation of conspiracy in so far as it relates to the period after the commencement of the first suit cannot be sustained, for reasons previously explained.

Summary Of Findings

[74] I find that:

(a) in the absence of any agreement, any express or implied authorisation, or any representation that invokes the application of the doctrine of ostensible authority, the receivers and managers cannot carry out any act that will operate to bind RHB, as the actions of the receivers and managers are carried out on behalf of the company as chargor; and

(b) RHB *qua* debenture holder does not owe a duty of care to the plaintiff as a purchaser of the secured properties.

[75] Having regard only to the pleadings, I am of the view that the amended statement of claim does disclose a reasonable cause of action.

[76] I further find that the settlement agreement did not and could not have the effect of defeating the plaintiff's claimed interest in the subject properties, as the terms of the settlement agreement contained provisions that sought to

preserve the plaintiff's rights in the subject properties should it succeed in the first suit. Accordingly, the portions of the amended statement of claim that relate to the allegation of conspiracy surrounding the settlement agreement ought to be struck out pursuant to O. 18 r. 19(1)(b) of the Rules of Court 2012.

[77] Based on a proper construction of the 17 March 2014 grounds of judgment in respect of the interlocutory application in the first suit, there was no definitive finding on the question of conspiracy relating to the period prior to the commencement of the first suit. Accordingly, *res judicata* does not apply to bar the plaintiff from maintaining the cause of action of conspiracy against the first to 11th defendants in respect of such period.

[78] However, the commencement of this suit based on the same pleaded facts amounts to an attempt to circumvent the necessary appeal procedure and is thus an abuse of process of court. The whole of the plaintiff's action in the present suit is accordingly dismissed pursuant to O. 18 r. 19(1)(d) of the Rules of Court 2012, with costs of RM30,000 to be paid by the plaintiff to the first to third defendants, RM15,000 to the fourth to 11th defendants and RM30,000 to the 12th defendant.

Endnote:

1. Enclosure 20
2. Enclosure 24
3. Enclosure 17
4. [2008] MLJU 919
5. See for example cl. 12.6 of the debenture, which sets out the powers of the receivers and managers
6. [1955] Ch 634
7. Exhibit A-26 of encl. 22
8. Paragraph 35(i) of the plaintiff's amended statement of claim
9. [1979] 2 MLJ 240
10. [1971] Ch 949
11. [2000] Ch 686
12. [1997] 2 CLJ 104; [1996] 2 MLJ 57
13. [2014] 1 LNS 1493; [2014] MLJU 1084
14. [2003] 4 CLJ 213; [2003] 4 MLJ 633